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No. 99-1756

Supreme Court, U.S.
FILED
JUL 5 2000
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In The

Supreme Court of the United States

GREAT WESTERN CASINOS, INC.,

Petitioner,

vs.

MORONGO BAND OF MISSION INDIANS, TRIBAL COUNCIL OF THE MORONGO BAND OF MISSION INDIANS, ADELAIDE PRESLEY, MARY ANN ANDREAS, CHARLES G. MARTIN, FRANK LYNCH, FRANK LUGO, JR., JOHN E. ALLEN, RODNEY MATTHEWS, DENNIS B. MILLER, SHIRLEY BLOCKER, BARBARA A. CALDERON, CALVIN T. MARTIN, CLIVE MILLER, SARAH E. NECOCHEA, ORLEN HOUGH, CLINTON HOUGH, SR., ALEXANDER & KARSHMER, a law partnership, BARBARA KARSHMER,

Respondents.

On Petition For Writ Of Certiorari To The Court Of Appeal Of The State Of California

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a State court judgment that Petitioner failed to exercise its contractual dispute resolution remedies, and consequently that Petitioner had no cause of action and Respondents were immune from suit, raises any federal law issue that would merit review by this Court.

2. Whether a State court judgment affirming that Tribal sovereign immunity extends to Tribal governmental officials, Tribal members, and Tribal attorneys acting in their official capacities on behalf of the Tribe, presents any conflict with federal law that would merit review by this Court.

3. Whether a State court judgment upholding settled federal preemption doctrine with regard to civil claims against Indian Tribes presents any conflict with federal law that would merit review by this Court.

PARTIES TO THE PROCEEDING

All of the parties to the proceedings below are identified in the caption and in the Petitioner's Appendix at 33. Petitioner's Appendix contains a list of individual members of the Morongo Band of Mission Indians served with process and, according to the California Court of Appeal, "included in the complaint simply because they are members of the Tribe." (Pet. App. at 22.)

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STATEMENT OF THE CASE

The California Superior Court, Court of Appeal, and Supreme Court all denied relief to Petitioner based on Petitioner's admissions in its pleadings and the undisputed record evidence that: (1) Petitioner had failed to invoke its contractual dispute resolution remedies, and therefore had no cause of action against a Tribal sovereign; (2) all the individually-named Tribal defendants in the case were acting in their official capacities within the course and scope of their Tribal authority as officers and agents of the federally-recognized Morongo Band of Mission Indians ("Tribe"); and (3) all claims asserted by Petitioner were preempted by the federal law which comprehensively regulates the field of Indian gaming.

Although Petitioner's Statement of the Case is "directly quoted from the California Court of Appeal's opinion, . . . " (Pet. at 3.), Petitioner has omitted critical facts regarding its pleadings and its utter failure to exercise its contract remedy or to dispute the evidence of the individual respondents' official capacity. Respondents therefore set forth a more complete statement here. Supreme Court Rule 15.2.

Following its decision in 1991 to expand the gaming enterprise on its reservation, the Tribe entered into a detailed written management agreement ("Agreement") with the Petitioner's predecessor in interest, a firm known as E.C. Investments, Inc. ("ECI"). In the 1992 Agreement, approved by the U.S. Secretary of the Interior, ECI promised to invest $5,000,000 toward the cost of developing an on-reservation gaming enterprise. In

return for its monetary investment and for its management of the newly-capitalized gaming operation, ECI was to receive as its fee thirty percent of the Tribe's net gaming profits. (Pet. App. at 3.)

The Agreement provided that ECI was to manage the gaming enterprise for a period of five years. However, the Agreement expressly contemplated the possibility of an earlier termination either for cause, or without cause. Termination of the Agreement "for cause" could occur for such indiscretions as "theft" or for "willful failure to perform," interference with Tribal affairs, ECI's affiliation with persons or entities related to organized crime, or "other material breach." (Pet. App. at 3 n. 1.)

The Agreement permitted the Tribe to terminate the contract "without cause" "if ECI had recovered its investment in full in an amount not to exceed $5,000,000." (Pet. App. at 18.) Furthermore, if the Tribe terminated the contract "wrongfully, in bad faith," the Agreement provided that ECI could recover at most the amount of its initial investment, not to exceed the $5,000,000 ECI was required to spend. (Pet. App. at 5-6.)

The Agreement spelled out the exclusive procedure ECI was required to follow to recover its initial investment in the event of any "wrongful" termination without cause: informal negotiations, followed by mandatory arbitration, followed by court action with relief limited to "moneys in an amount not to exceed the manager's unreimbursed initial capital contribution not to exceed $5,000,000." (Pet. App. at 5.) The Tribe granted a limited waiver of its sovereign immunity, solely to permit the designated relief in the event of wrongful termination

without cause and expressly conditioned upon ECI's compliance with the contractual dispute resolution procedures. In all other respects, the Agreement specified that the Tribe retained its sovereign immunity. (Pet. App. at 5-6.)

Approximately two years later, in May, 1994, ECI and its principals were indicted by the U.S. Attorney for felony gaming violations.[1] The Tribe was compelled to suspend ECI as the manager of the gaming facility. Following a guilty plea, ECI and its principals were convicted of possession of illegal gaming devices. (Pet. App. at 7.)

The following year, the Tribe terminated the Agreement "without cause" on the ground that ECI had more than fully recouped its initial investment. (Pet. App. at 18.) The record evidence before the trial court, which Petitioner made no attempt to dispute, was that ECI had advanced only $1,797,132 of the $5,000,000 it was required to have invested. (Pet. App. at 19.) The record evidence further proved – without dispute by Petitioner –

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[1] Petitioner's first amended complaint asserts that "Native American informant(s)" caused the FBI to investigate ECI, the U.S. Attorney to indict ECI on 23 felony counts of gaming violations, and the United States District Court to eventually accept ECI's plea of guilty to a felony count of possession of illegal gaming devices. (Pet. App. at 7.) Petitioner's complaint did not disclose any factual basis for ascribing to the "Native American informant(s)" such plenary power over federal agencies and federal courts. The complaint did not assert facts to support its claims that the defendants possessed such omnipotence, and despite ample opportunity in the trial court, the Petitioner did not adduce any such evidence.

that the Tribe had paid to ECI the sum of $4,162,875 (its thirty percent of the profits) prior to the suspension in May, 1994. *Id.* Thus, ECI had been paid approximately $2.3 million more in management fees than it had invested in the enterprise, (Pet. App. at 19.), and the Tribe had an absolute contractual right to terminate the Agreement. Petitioner made no attempt to dispute these facts at any stage of the proceedings.

The record evidence shows, and Petitioner never disputed, that ECI failed to pursue the mandatory dispute resolution procedures that ECI had contracted for in the Agreement. ECI did not pursue informal resolution. (Pet. App. at 18.) ECI did not seek to arbitrate. (*Id.* at 18.) Instead, more than two years after termination of the Agreement, Great Western Casinos ("GWC") (claiming to be the successor-in-interest to ECI)[2] filed suit in a California State court. GWC sought "over $1 billion in damages, subject to trebling under the count for the alleged civil RICO violation." (Pet. App. at 8.)

Disregarding its own Agreement with the Tribe expressly limiting the Tribe's consent to suit, ECI/GWC sued for "bad faith breach of contract, fraud, breach of fiduciary duty, constructive fraud, conversion, interference with business relations, abuse of process, civil RICO,

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[2] ECI claimed to have assigned the management agreement to a successor in interest, the Petitioner, Great Western Casinos Inc. ("GWC"). If such an assignment occurred, it caused a breach of the management agreement which prohibited assignments without the consent of the Tribe and without approval of the United States Secretary of the Interior. (Pet. App. at 19.)

money had and received, imposition of a constructive trust, accounting and dissolution of partnership . . . " (Pet. App. at 8.) The named defendants included the Morongo Band, "its [governing] council, its individual council members, individual members of the Tribe, and the Tribe's general counsel." *Id.*

A. Petitioner's Failure to Invoke Its Contractual Remedies and the Contractual Reservation of Sovereign Immunity

Petitioner does not disclose in its Petition its failure to exercise its mandatory contractual remedies. As accurately stated by the California Court of Appeal:

> It is true that the tribe agreed to waive its sovereign immunity and consent to suit, but only in a narrowly defined situation. According to various clauses in the parties' management contract GWC could only file suit, and then only to recover the balance of its initial investment if (1) a board of arbitrators found the tribe had breached the management contract without cause and in bad faith; (2) at a time GWC had not yet recouped its initial investment in the enterprise; (3) and despite informal negotiations prior to the arbitration and (4) a lapse of more than ten days after receipt of the arbitration board's findings without a satisfactory response from the tribe. If these conditions were satisfied then the tribe agreed to submit to litigation to the extent necessary to permit ECI/GWC to recover the balance of its initial investment. For all other situations the tribe expressly reserved its sovereign immunity in the management agreement.

> Nowhere in GWC's complaint does it allege it complied with any of these preconditions to bringing suit under the management contract. Indeed, the undisputed evidence before the trial court indicates GWC could not amend its complaint to allege it had not yet recovered its initial investment or that it had satisfied the necessary conditions of making a request to the tribe for arbitration to recover any balance of its initial investment and the like.
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> . . . .
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> In short, it appears the conditions under which the tribe's agreement to waive its sovereign immunity and consent to arbitration and suit to resolve contract disputes were not satisfied in this case. Moreover, the management agreement makes clear, and GWC does not dispute, the tribe did not waive its sovereign immunity regarding any of the other 14 causes of action alleging tort claims. Accordingly, the trial court did not err in finding sovereign immunity barred this suit against the tribe and its governing body.

(Pet. App. at 17-18.) The state courts simply enforced the terms of the contract to which ECI/GWC had agreed. By choosing to ignore the preconditions to suit set forth in the contract, ECI/GWC relinquished its claims against the Tribe.

B. Petitioner's Admissions of Official Capacity and Failure to Allege or Adduce Evidence of Individual Capacity

Petitioner does not disclose in its Petition the specific allegations of its complaint against the Tribal officials. Petitioner sued each individual defendant in his/her official capacity by alleging that such persons were acting at all times as agents of, or on behalf of the Tribe. The Petitioner's allegations, as accurately summarized by the California Court of Appeal, are as follows:

> GWC's first amended complaint alleges no individual actions by any of the tribal officials on the tribal council named as defendants, (or for that matter, any of the individual tribal members named as defendants). It does not allege any tribal official acted independently of the tribe or its council. Thus the allegations of GWC's first amended complaint demonstrate the action is in substance against the tribe itself.
>
> The complaint alleges the tribal council "approves," "rejects" and "implements" "policies and action for and on behalf of the MORONGO BAND." In a specific example, the complaint alleges "the MORONGO BAND, acting through the TRIBAL COUNCIL, unlawfully and in violation and in breach of the Management Agreement, suspended the Management Agreement and GWC's right thereunder and withheld from GWC all of the profits to which it was entitled."
>
> . . . Without more it is difficult to view the suit against the tribal officials as anything other than a suit against the tribe itself.

> . . . In other words, the allegations of the complaint do not suggest any individual council member acted beyond his or her official authority in so voting. On the contrary, the complaint acknowledges each acted in his or her representative capacity, as a member of the tribal council, and on behalf of the tribe. In this case it was clearly the tribe which authorized canceling the management agreement with GWC.

(Pet. App. at 20-21.) Petitioner's assertions in this Court (that such officials acted outside of, or in excess of their authority) are not found anywhere in the record of these proceedings.

C. Petitioner's Admissions Regarding Tribal Members and Failure to Allege or Adduce Evidence of Individual Capacity

Similarly, Petitioner does not disclose in its Petition the specific allegations of its complaint against the Tribal members. The Petitioner's allegations, as correctly summarized by the California Court of Appeal, are as follows:

> . . . [T]he complaint acknowledges even the individual tribal members allegedly were acting "on behalf of the Morongo Band" and were alleged to have been "employed by or associated with Casino Morongo and the MORONGO BAND." Again the complaint alleges no specific act committed by any individual member. It appears the individual members were included in the complaint as defendants simply because they are members of the tribe. . . . In other

> words, the substance of the complaint's allegations concerning the individual Indian defendants are again in reality against the tribe's allegedly wrongful actions.

(Pet. App. at 21-22.) The allegations Petitioner makes in this Court, that the Tribal members acted in some unspecified manner to promote interests apart from those of the Tribe, do not appear anywhere in the record of the proceedings below.

D. Petitioner's Admissions Regarding the Tribal Lawyers and Failure to Allege or Adduce Evidence of Individual Capacity

Similarly, Petitioner does not disclose in its Petition the specific allegations of its complaint against the Tribal lawyers. The Petitioner's allegations, as correctly summarized by the California Court of Appeal, are as follows:

> . . . Here, the complaint acknowledges defendants Alexander & Karshmer and Barbara E. Karshmer, Inc., legal counsel for the tribe, were "at all times herein mentioned retained by and representing the MORONGO BAND." The complaint further alleges "the MORONGO BAND did, on April 18, 1995, acting through the TRIBAL COUNCIL and KARSHMER, terminate the Management Agreement, . . .

(Pet. App. at 22-23.) The Court of Appeal relied on settled federal law to find that the Tribal lawyers in providing the Tribe legal representation "were similarly immune from liability for those professional services." (Pet. App. at 23, *citing, Davis v. Littell*, 398 F.2d 83, 85 (9th Cir. 1968)

and, Gaming Corp. of America v. Dorsey & Whitney, 88 F.3d 536, 550 (8th Cir. 1996)).)

The case was decided by the three levels of the State court system on the basis of the above allegations of the complaint as supplemented by the Agreement, the financial data (concerning ECI's limited investment and substantial profit), and the other sworn evidence submitted by the Tribe.[3] (Pet. at 9.) Petitioner wholly failed to respond to, much less rebut, the evidence. The State Court of Appeal affirmed the trial court, holding that in the Agreement the Morongo Band had waived its sovereign immunity and consented to suit in only a "narrowly defined situation," and that ECI/GWC had chosen to ignore the stipulated remedies. "[T]he conditions under which the tribe agreed to waive its sovereign immunity and consent to arbitration and suit to resolve contract disputes were not satisfied in this case." (Pet. App. at 19.) The court found that the individual defendants, all of whom were alleged to have been acting on behalf of the Tribe, were similarly immune from suit. (Pet. App. at 25.)

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[3] The Tribal Chairperson, Mary Ann Andreas, submitted a declaration providing unrebutted evidence that the Tribe terminated the Agreement under the "without cause" provisions of the Agreement (demonstrating that ECI had recovered its initial investment more than two-fold). The Tribe's chief financial officer submitted a declaration providing unrebutted evidence as to the precise amounts of ECI's initial investment ($1.7 million approximately) and the Tribe's payments to ECI ($4.1 million approximately). (Pet. App. at 18-19.) Tribal counsel Barbara E. Karshmer submitted a declaration that in all matters her law firm acted at the "express direction of the Tribe" and within the scope of her authority as general counsel to the Tribe.

"As an alternative ground" for its decision, the court found that federal law (the Indian Gaming Regulatory Act, 25 U.S.C. § 2701 *et seq.*) "completely preempts the field of litigation involving Indian gaming." (Pet. App. at 30.)

Following the California Supreme Court's denial of review, GWC petitioned this Court for a writ of certiorari.

REASONS FOR DENYING THE WRIT

Relying on settled principles of federal and State law, the State court correctly decided the case as pleaded by ECI/GWC in its amended complaint. In an apparent attempt at diverting attention from these settled principles, ECI/GWC argues in this Petition a markedly different case: having lost its claims below, ECI/GWC now seeks to assert theories of individual liability which are entirely absent from its amended complaint. The State court applied settled principles of federal law to those pleadings. The decision does not conflict with any decision of this Court, nor does it raise any issue deserving of this Court's attention under Rule 10. There is no basis for granting the writ. Supreme Court Rule 10(c); 28 U.S.C. § 1257(a).

I. THE STATE COURT'S PLAIN READING OF THE UNDISPUTED CONTRACT TERMS AND UNCONTROVERTED RECORD EVIDENCE RAISES NO FEDERAL OR OTHER ISSUE FOR REVIEW BY THIS COURT

As described above, the State court based its judgement on the plain terms of the Agreement and the other uncontroverted record evidence. This evidence demonstrated, without objection or dispute by Petitioner, that Petitioner had failed to exercise its contractual remedies, and that the Tribe agreed to waive its immunity as to contract claims only to the extent Petitioner exercised its contractual remedies. The evidence further demonstrated that the Tribe had never waived its immunity, under any circumstances, as to the other 13 non-contract causes of action alleged by Petitioner. Despite ample opportunity to do so, Petitioner wholly failed to plead any facts or adduce any evidence that any individual had acted outside the course and scope of his or her Tribal authority. The State court had no choice but to dismiss the case on contract grounds alone.

The State court's straightforward contract interpretation and evidentiary review provides no basis for review by this Court. Even were Petitioner to argue – and it does not – that the State court misconstrued the Agreement or the other evidence, such "erroneous factual findings" are not Rule 10 grounds for granting a petition for writ. *See, e.g., Ticor Title Insurance Co. v. Brown*, 511 U.S. 117, 122 (1994) (writ of certiorari dismissed as improvidently granted; merely correcting errors made by a court below, or "achieving justice in a particular case," are not sufficient bases for this Court's review).

II. THE STATE COURT CORRECTLY APPLIED THE SETTLED FEDERAL RULE ACCORDING SOVEREIGN IMMUNITY TO INDIAN TRIBES

The State court correctly applied settled law of this Court regarding the scope of sovereign immunity for Indian Tribes.

From early in our Nation's history, this Court has acknowledged the sovereign status of Indian tribes. *Cherokee Nation v. Georgia*, 30 U.S. 1 (1831); *Worcester v. Georgia*, 31 U.S. 515 (1832). This Court has recognized sovereignty deriving from a Tribe's status "as a separate people with the power of regulating their internal and social relations." *United States v. Kagama*, 118 U.S. 375, 381-382 (1886).

As an attribute of sovereignty, the doctrine of Indian Tribal immunity from suit is "settled law." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751, 756 (1998). Indian Tribes possess a "common law immunity from suit," a principle that has been recognized for decades. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Indian Tribal immunity from suit provided the basis for the State court's dismissal of these claims, given the undisputed reservation of that immunity in the Agreement between Petitioner and the Tribe.

While acknowledging the rule of Tribal immunity from suit, Petitioner argues that there exists a judicial "antagonism" toward the settled doctrine. (Pet. at 12.) Undeniably, this Court has stated that there may be "reasons to doubt the wisdom of perpetuating the doctrine." *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, supra*, 523 U.S. at 758. However, as this Court also stated,

the issue is one for Congress alone to resolve. *Id.* (the Court "defer[s] to the role Congress may wish to exercise in this important judgment.")[4]

Notably, the concerns expressed by this Court in *Kiowa* relate to instances in which "those who are unaware that they are dealing with a tribe, who do not know of tribal immunity, or who have no choice in the matter," may be harmed by the invocation of the immunity doctrine. *Id.* No such concerns arise in the instant case, in which ECI/GWC alleged itself to be a sophisticated organization, alleged its expertise in Indian gaming operations, and entered into a detailed and lengthy written management agreement with an Indian Tribe, which specifically waived sovereign immunity under limited conditions, and expressly reserved the Tribe's sovereign immunity from suit otherwise. ECI/GWC has never claimed, and could not credibly claim that it was ignorant of Morongo's status as a federally-recognized Indian Tribe, or of the specific reservation of sovereign immunity in the management agreement. Far from the concerns expressed by the Court in *Kiowa*, ECI/GWC of its free choice and with the full assistance of its lawyers entered into a lucrative contract to manage an Indian gaming enterprise.

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[4] A similar judicial aversion was acknowledged by this Court 50 years ago, and rejected then as it was in *Kiowa*, on the grounds that the abrogation or restriction of sovereign immunity was a matter best left to the discretion of the Congress. *Larson v. Domestic & Foreign Corp*, 337 U.S. 682, 703 (1949) ("It is argued that the principle of sovereign immunity is an archaic hangover not consonant with modern morality and that it should therefore be limited wherever possible.")

The State court simply enforced ECI/GWC's contractual stipulation governing the scope of the Tribe's sovereign immunity from suit. As a result, and in the absence of Congressional action, this case does not present any occasion to revisit the question of the viability or wisdom of the sovereign immunity doctrine.

III. THE STATE COURT CORRECTLY APPLIED THE SETTLED FEDERAL AND STATE RULE THAT SOVEREIGN IMMUNITY ACCORDED TO INDIAN TRIBES EXTENDS TO TRIBAL OFFICERS, MEMBERS, AND ATTORNEYS WHILE ACTING IN THEIR OFFICIAL CAPACITIES AND WITHIN THE COURSE AND SCOPE OF THEIR TRIBAL AUTHORITY

While acknowledging the immunity of the Tribe, ECI/GWC nevertheless invites this Court to "abrogate the overarching immunity rule." (Pet. at 15). ECI/GWC argues that Tribal officials, Tribal members, and Tribal attorneys (all of whom are alleged by Petitioner to have been acting on behalf of the Tribe) should be subject to individual liability. (Pet. at 14-16.) Thus, by means of individual liability, according to Petitioner, the Court could avoid the inconvenience of sovereign immunity and "effectively compel[. . .] the Morongo Tribe to obey the law." (Pet. at 15.)

There is no reason for this Court to address this point, because the State court correctly applied settled law regarding the scope of sovereign immunity for persons acting in their official capacities within the course and scope of their Tribal authority. It has long been established that the actions of an officer of a sovereign,

within the scope of the officer's authority, "are the actions of the sovereign." *Larson v. Domestic & Foreign Corp.*, 337 U.S. at 695. The agent's authorized actions then, are subject to the doctrine of sovereign immunity. *Id.* The agent of a sovereign may be held liable only when the agent acts "in excess of his authority or under an authority not validly conferred." *Id.* at 691; *see, e.g., Florida Department of State v. Treasure Salvors, Inc.*, 458 U.S. 670, 689 (1982) (Eleventh Amendment immunity "does not bar an action against a state official" who has "acted beyond the scope of his authority or, if within that authority, that such authority is unconstitutional"); *and see, Boisclair v. Superior Court*, 51 Cal.3d 1140, 1157 (1990) (actions of Tribal officials in excess of their Tribal authority are not entitled to sovereign immunity).

It follows that immunity might not apply to individual Tribal members and officials acting outside the scope of a tribal official's authority. *Santa Clara Pueblo v. Martinez, supra*, 436 U.S. at 59, *citing, Ex Parte Young*, 209 U.S. 123 (1908). But one cannot, as Petitioner has attempted to do here, "avoid the doctrine of sovereign immunity by the simple expedient of naming an officer of the Tribe as a defendant, rather than the sovereign entity." *Snow v. Quinalt Indian Nation*, 709 F.2d 1319, 1322 (9th Cir. 1983), *cert. denied*, 467 U.S. 1214 (1984), *citing Larson v. Domestic and Foreign Commerce, supra*, 337 U.S. 682; *accord, Imperial Granite Co. v. Pala Band of Mission Indians*, 940 F.2d 1269 (9th Cir. 1991).

As stated concisely by the State court of appeal, " . . . the allegations of GWC's first amended complaint demonstrate the action is in substance against the Tribe itself." (Pet. App. at 20.) GWC complains about "official

actions . . . on behalf of the Tribe . . . " (*Id.* at 21.) There are neither allegations, nor any factual basis for allegations that any individual Tribal official, Tribal member, or Tribal attorney acted in anything other than their representative and official capacity on behalf of the Tribe. The court of appeal summarized the complaint:

> . . . [T]he complaint acknowledges even the individual tribal members allegedly were acting "on behalf of the Morongo Band" and were alleged to have been "employed by or associated with Casino Morongo and the MORONGO BAND." Again the complaint alleges no specific act committed by any individual member. It appears the individual members were included in the complaint as defendants simply because they are members of the tribe. . . . In other words, the substance of the complaint's allegations concerning the individual Indian defendants are again in reality against the tribe's allegedly wrongful actions.

(Pet. App. at 21-22.)

Thus, ECI/GWC's allegations in the State court (in contrast to its strikingly different assertions in this Court), demonstrate that the State court relied upon settled principles of federal law in dismissing the action. Supreme Court Rule 10(c). There is no claim of federal law which has not been decided already by this Court. *Id.* There is no basis, and certainly no "compelling reason" for review under these circumstances. *Id.*

IV. THE STATE COURT CORRECTLY APPLIED FEDERAL PREEMPTION DOCTRINE TO CONCLUDE THAT CONTRACT AND TORT CLAIMS ARISING FROM INDIAN GAMING ACTIVITIES BROUGHT AGAINST TRIBAL GOVERNMENT OFFICIALS, TRIBAL MEMBERS, AND TRIBAL ATTORNEYS ARE PREEMPTED BY FEDERAL LAW

As a separate and "alternative ground" for dismissing the Petitioner's claims, the State court of appeal adopted the analyses of federal courts of appeals holding that the Indian Gaming Regulatory Act ("IGRA," 25 U.S.C. § 2701 *et seq.*) completely preempts the field of Indian gaming. The State court therefore dismissed all State law contract and tort claims, as well as the federal RICO claim; Petitioner had asserted no claims under Indian Gaming Regulatory Act. (Pet. App. at 30.)

Petitioner asserts, without citation to authority, without reasoned analysis, and virtually without discussion, that it "was error" for the State court to conclude that IGRA completely preempted State regulation of Indian gaming. (Pet. at 18.) Because the State court was correct in agreeing that IGRA has preempted the field of Indian gaming regulation, and because the issue is without controversy in the federal courts, there is no basis for review here. Supreme Court Rule 10(c).

Petitioner's assertion that Public Law 280 (28 U.S.C. § 1360) grants the California State courts jurisdiction to

hear the civil causes advanced here is unavailing.[5] (Pet. at 18.) The State court correctly disposed of that contention, relying on the precedents of this Court:

> It is settled 28 U.S.C. section 1360 confers jurisdiction only over individual Indians, and not over Indian tribes or tribal entities. (*Bryan v. Itasca County, Minnesota* (1976) 426 U.S. 373, 389 [further citations omitted]. . . .
>
> The *Bryan* court found Congress' use of the phrase "civil laws of general application" narrowed the reach of state court jurisdiction. The court thus concluded Congress meant this phrase to cover only civil litigation involving strictly "private persons or private property" touching on, "the laws of contract, tort, marriage, divorce, insanity, descent," and the like. [further citations omitted].

(Pet. App. at 29-30.) Because the State court correctly found that "the substance of the complaint's allegations concerning the individual Indian defendants are [sic]

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[5] Public Law 280 was adopted by Congress in the 1950s, as part of its now-abandoned policy of "promoting the gradual assimilation of Indians into the dominant American culture . . ." *Three Affiliated Tribes of Ft. Berthold v. Wold Engineering*, 476 U.S. 877, 885-886 (1986). The law was not intended to "result in the undermining or destruction of such tribal governments as did exist" at the time of its passage. *Bryan v. Itasca County*, 426 U.S. 373, 387 (1976). The statute clearly did not confer jurisdiction over Tribes. *Id.* Any jurisdiction over individual Indians was "only lawful to the extent that it was consistent with Indian Tribal sovereignty and self-government . . . " *Three Affiliated Tribes, supra*, 476 U.S. at 888. Thus, Public Law 280 is not implicated by GWC's complaint here, which asserts claims against the Tribe and individuals acting in their official capacities on behalf of the Tribe.

again in reality against the tribe's allegedly wrongful actions" (Pet. App. at 21-22), the *Bryan* rule is fully applicable and there is no reason for this Court to review the analysis of the State court.

Furthermore, Petitioner cites no authority to support the contention that Public Law 280 confers upon state courts jurisdiction to resolve a dispute about an on-reservation Indian gaming enterprise. This argument is nothing more than an attempt to avoid the central question resolved by the State court: the determination that Congress, in adopting a statute which comprehensively regulated Indian gaming enterprises, intended to fully occupy the field of Indian gaming to the exclusion of state courts and state claims. The scope of any authority conferred upon state courts by Public Law 280 over individual Indians is not at issue if, as the federal courts have uniformly held, Congress has completely preempted the field of Indian gaming in IGRA.

This Court's pre-IGRA decision in *California v. Cabazon and Morongo Band of Mission Indians*, 480 U.S. 202 (1987), IGRA itself, and IGRA's legislative history leave little room for argument over the preclusive effect of the Act. This Court has determined that California's claim to authority over Indian gaming on the Morongo Reservation was preempted by operation of federal law. *Cabazon, supra*. State jurisdiction was found there to be "incompatible with federal and tribal interests reflected in federal law." *Id.* at 216-17.

In response to this Court's *Cabazon* decision, Congress adopted IGRA., affirming that "Indian Tribes have the exclusive right to regulate gaming activity on Indian

lands if the gaming activity is not specifically prohibited" by federal and state law. 25 U.S.C. § 2701(5). Congress's comprehensive statutory scheme governing Indian gaming was intended to strike a careful balance among federal, state and tribal interests. *See*, S.Rep. No. 100-446, at 5-6 (1988) *reprinted in* 1988 U.S.C.C.A.N. 3071, 3074-76. Central to this balance was the limit upon application of state laws and state jurisdiction to Indian affairs on tribal lands. The Act was expressly intended to "preempt the field in the governance of gaming activities on Indian lands." *Id.* at 3076.

The federal circuit courts of appeals have uniformly interpreted the Act to carry out Congress's intent to preempt the field of Indian gaming. "Congress thus left states with no regulatory role over gaming except as expressly authorized by IGRA, and under it, the only method by which a state can apply its general civil laws to gaming is through a tribal-state compact." *Gaming Corporation of America v. Dorsey & Whitney, supra,* 88 F.3d at 546; *see also, Tamiami Partners, Ltd. v. Miccosukee Tribe of Indians,* 63 F.3d 1030, 1032 (11th Cir. 1995) (IGRA completely occupies the field of Indian gaming through the "broad reach of the statute's regulatory and enforcement provisions"); *Cabazon Band of Mission Indians v. Wilson,* 37 F.3d 430, 433-35 (9th Cir. 1994) (IGRA preempts state license fee); *cf., Florida v. Seminole Tribe of Florida,* 181 F.3d 1237, 1247 (11th Cir. 1999) (IGRA prescribes "thoroughgoing limits" on the application of state laws and jurisdiction to Indian gaming), *and see, State Ex Rel. Nixon v. Coeur D'Alene Tribe,* 164 F.3d 1102, 1108 (8th Cir. 1999) (IGRA's "preemptive force" applies to Indian gaming on Indian lands). The State court decision here relies upon,

adheres to, and is consistent with this federal law, and therefore does not warrant review by this Court.

Both here, and in the State court, GWC failed to cite any authority for its contention that Public Law 280 (adopted in 1953) somehow provides State court jurisdiction over claims against an Indian Tribe arising under the Indian Gaming Regulatory Act (adopted in 1989 to comprehensively regulate such gaming).[6]

There is no such authority. The State court ruled, consistent with the uniform law of the federal circuit courts of appeals, that Petitioner's claims were entirely preempted by IGRA. Petitioner has offered no coherent basis for its assertion that the decision is appropriate for review by this Court. Supreme Court Rule 10(c).

CONCLUSION

There is here no "compelling reason" for review by this Court. Supreme Court Rule 10. The state court simply enforced a written agreement, dismissing Petitioner's claims because Petitioner's predecessor had signed a contract spelling out its remedies but otherwise reserving to the Indian Tribe the Tribe's sovereign immunity from suit, and had failed to pursue its contractual remedies.

[6] Petitioner's assertion that these claims are brought against the "non-Tribe defendants" suffers from the same fatal defects that afflicted its effort to avoid the bar of immunity. GWC's complaint states facts establishing that all "non-Tribe defendants" were acting in their official capacities, within the scope of their authority, and on behalf of the Tribe.

The state court simply accepted Petitioner's pleadings asserting that Tribal officials, Tribal members and Tribal attorneys were all acting within their official capacities; it followed under settled law that the Tribe's immunity applied to its officers and agents acting within the scope of their official authority. The state court simply acknowledged that Petitioner, a gaming management company, was complaining about Indian gaming activities; the state court then followed the uniform federal precedent which established that Congress had completely preempted the field of law governing Indian gaming.

For these reasons, the petition for the writ should be denied.

Respectfully submitted,

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